U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 31 March 2005

CASE NO.: 2004-LHC-1897

OWCP NO.: 07-168673

IN THE MATTER OF:

FELTON E. RAVIA

Claimant

V.

CALEB BRETT USA, INC.

Employer

AND

NEW HAMPSHIRE INSURANCE CO.

Carrier

APPEARANCES:

JERE JAY BICE, ESQ.

For The Claimant

JEFFERY I. MANDEL, ESQ.

For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Felton E. Ravia (Claimant) against Caleb Brett USA, Inc. (Employer) and New Hampshire Insurance Co.

(Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on November 9, 2004, in Lake Charles, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 11 exhibits, Employer/Carrier proffered 8 exhibits which were admitted into evidence along with two Joint Exhibits. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer/Carrier. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That there existed an employee-employer relationship at the time of the accident/injury.

2. That Employer/Carrier filed Notices of Controversion on January 20, 2004 and February 7, 2004.

3. That Claimant's average weekly wage at the time of injury was $662.91.

II. ISSUES

The unresolved issues presented by the parties are:

1. Fact of injury.

2. Whether Employer received timely notice.

3. The nature and extent of Claimant's disability.

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[1] References to the transcript and exhibits are as follows: Transcript: Tr._____ ; Claimant's Exhibits: CX-_____; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

4. Entitlement to compensation benefits.

5. Whether Claimant has reached maximum medical improvement.

6. Entitlement to and authorization for medical care and services.

7. Whether Employer/Carrier are entitled to Special Fund relief under Section 8(f) of the Act.

8. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified at formal hearing. He began employment with Employer in May 2002 as a marine cargo inspector. His job duties included gauging and calculating the transfers of marine cargo from vessels to refinery. The job required Claimant to climb the "shore tanks," sample cargo, climb railcars, reach and climb up ladders on top of railcars, and complete paperwork. (Tr. 27-28). Climbing the ladders involved using one hand to hold the hand rail and using the other hand to hold work equipment, which included a bucket, sampling containers, and sampling equipment. (Tr. 28). Claimant testified the equipment weighed approximately 20 pounds before the samples were filled and weighed between 35 and 40 pounds afterwards.[2] (Tr. 28, 63). On cross-examination, Claimant agreed that his job provided "flexibility" regarding the amount of weight that was carried. Specifically, Claimant agreed that he could "divide the weight up" and make several trips, if done in "a timely manner." (Tr. 65).

Claimant testified that his job also required overhead reaching and climbing. (Tr. 29). On cross-examination, Claimant testified that "[w]hen you're pulling samples you're lifting your arms and your shoulders and your hands head high, getting them out of the cargo, both hands." (Tr. 66). However, he recalled stating during his deposition that his work varied from waist to ankle height. At formal hearing, Claimant

[2] On cross-examination, Employer referred to Claimant's deposition testimony in which he testified that he carried an "average" of 20 pounds. (Tr. 64-65).

specified that his work was "waist high to ankle high" as "far as the gauges and everything." However, he would not limit a description of his job to work within those heights. (Tr. 66).

Claimant was in a boating accident on July 4, 2002, which injured his ribs. (Tr. 84). In August or September 2002, Claimant began experiencing problems with his left shoulder. He sought treatment with Dr. Stewart, his family physician. Claimant continued to work and Dr. Stewart referred him to an "orthopedic." (Tr. 29-30). He testified to a gradual onset of left shoulder pain, but also stated that he tripped and fell on a staircase at the Exxon-Mobil facility in Beaumont, Texas. He was uncertain of the exact cause of his left shoulder problems. (Tr. 85-86, 128-129). Claimant felt pain in his shoulder at night and when he "strained" while trying to pick up heavy objects.

He began treatment with Dr. Foret in October or November 2002 and was advised not to work. (Tr. 30). Claimant suffered from left shoulder tendonitis. (Tr. 85). An MRI of his shoulder was performed on November 14, 2002, which did not show a rotator cuff tear.[3] (Tr. 130). On March 25, 2003, Dr. Foret released Claimant to return to full duty work.[4] (Tr. 30-32). Between March and August 2003, Claimant's shoulder was "sore occasionally, but it did better." He testified that he could still perform his duties at work, including climbing. (Tr. 32, 87).

On his "Claim for Compensation Benefits," Claimant indicated that the injury in question occurred on August 16, 2003, because he did not have his "tally book" with him when he completed the form. He testified that he was as truthful as he could remember when filling out the form. However, employment records reveal Claimant was not working on August 16, 2003, and Claimant no longer has his "tally book" at the time of hearing to confirm that the accident occurred on August 18, 2003. (Tr. 89-91; EX-1, p. 30).

Claimant testified that he was injured at work in August 2003 while working at Devall East Fleet. Claimant was sent to inspect two "lube oil barges" and was not accompanied by any co-

[3] Claimant testified he did not injure his shoulder in the boating accident. (Tr. 129-130).

[4] Claimant testified that he did not receive workman's compensation during the time that he was not working. He was advised that he paid for disability insurance with his health insurance and could receive "some compensation from that, part-time disability, short-term disability." (Tr. 31).

workers. (Tr. 32-33). After Claimant arrived at Devall Fleet, he went to the boat dock and prepared his inspection equipment. He further described the events as follows:

> The tug pulled up and tied off, and I went down at that time – the barge out there – their loading dock is a sunken barge and it was cocked at an angle because it was filled with water, and they was pumping water out of there with a centrifugal pump it looked like to me, it was pumping that muddy water out of the barge to level it back up. And when I reached to get onto the tugboat after they tied off I slipped in the water that was being pumped on top of the deck barge, and I reached out to grab myself and I felt my shoulder tear and burn, and then I fell onto the deck of the tugboat.

(Tr. 33).

Claimant had a bucket in his right hand and reached to grab with his left arm as he began to slip. His feet "come out from underneath [him] and it just pulled down on [him], pulled down hard on [his] arm . . . ." (Tr. 33-34). Claimant testified that he felt a "pop" in his shoulder and then a "burning like fire inside the shoulder." He affirmed that he was "okay" when questioned by a deckhand and proceeded to inspect the barges pursuant with his job duties. (Tr. 34-35). He felt a "numb, aching sensation" in his shoulder after the fall. (Tr. 35).

Devall Fleet is a docking facility where Employer's clients dock their barges for inspection. (Tr. 93). Claimant contends the accident was witnessed by a deckhand. He could not testify whether the tug boat captain also witnessed the accident.[5] (Tr. 94, 97). He did not fill out an accident report with Devall Fleet and indicated at his deposition that he did not feel it was necessary. (Tr. 97-98, 100). Claimant finished his assignment and called Employer with the results of his inspection. Claimant did not report his accident to Employer at that time, although he knew it was company policy to report the accident immediately. (Tr. 99).

Upon his arrival at Employer's office on the same day, Claimant reported the accident to Chris Dobbs in the presence of Morgan Fisher. He did not ask to complete an accident report at that time, but asked to be sent to a doctor because his health

[5] Neither the deckhand nor the captain was called to testify at hearing because Claimant could not recall the name of the tugboat or the deckhand. (Tr. 97).

insurance had been terminated.[6] Claimant knew that an accident report had to be completed. (Tr. 37-38, 101-102). Claimant understood that he must report an accident to his immediate supervisor, who would then fill out the accident report.[7] (Tr. 125-126). Claimant did not file an accident report with Devall Fleet because it was not his employer and he believed Devall had not done anything wrong. He informed Mr. Dobbs about the accident approximately one hour and fifteen minutes to one and one-half hours after the accident occurred.[8] (Tr. 126-127).

Claimant testified that he asked Mr. Dobbs to complete an accident report three days later, but did not go to a higher official when the report was not completed. Claimant's testimony does not indicate whether anyone else was present at the time of the later discussion with Mr. Dobbs. (Tr. 103, 105). He also did not call the human resources department, the safety department, or the employee hotline. Claimant could not explain why he failed to utilize these alternative available reporting procedures. (Tr. 107-108).

According to Claimant, Mr. Dobbs agreed to "take it easy" on him because Mr. Dobbs "felt his job would be in jeopardy for an incident that happened earlier." (Tr. 42). Claimant testified that Mr. Dobbs was on probation and would not complete an accident report for fear of losing his job. (Tr. 104-105). He explained that he did not seek assistance from a higher official because Mr. Dobbs agreed to try to have his health insurance reinstated. (Tr. 105-106) At his deposition,

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[6] In June 2003, Claimant performed a job for Employer in Shreveport, Louisiana. His transmission "went out" during his return home. He had the transmission repaired in Shreveport, but was terminated for "not being readily available for work." Employer cancelled his health insurance on the day of his termination. Claimant was rehired the next day. (Tr. 37). On cross-examination, Claimant disagreed that he was terminated because Employer could not reach him for four days. (Tr. 70).

[7] Claimant identified Mr. Dobbs as the "office manager." According to Claimant, Mr. Dobbs was the "head man" at the "Sulphur office." (Tr. 43-44). On cross-examination, Claimant maintained that Mr. Dobbs was his direct supervisor and that he reported directly to Mr. Dobbs. He agreed that he spoke to Mr. Fisher on a daily basis and received work assignments through "whoever was dispatching on any given day." (Tr. 67). He believed Mr. Dobbs's supervisor was "somebody out of Houston." (Tr. 72). He admitted knowing that Bob Johnson was Mr. Dobbs's supervisor, but did not know Mr. Johnson's name or his position with the company. (Tr. 73-74).

[8] The "Intertek Testing Services Hourly Employee's Time Sheet" indicated Claimant worked on August 18, 2003 at Devall Fleet. It reflected that Claimant was called at "twelve" and he testified the accident occurred between approximately 1:15 and 1:30. (Tr. 35; CX-10, p. 5). He estimated that he spent ten to fifteen minutes on the barge during the inspection. (Tr. 36).

Claimant stated that he did not know why he failed to "go over his head or seek some other way to get a job accident report completed." (Tr. 106).

He continued to work and performed "regular jobs." (Tr. 38-39, 108). He testified that Mr. Dobbs placed him on light duty jobs for about a week and a half. The job duties did not involve climbing vessels, but consisted mostly of "driving and paperwork, reading meters," along with taking a few samples. Other employees were sent with Claimant on occasion, who performed the "strenuous parts of the work of sampling and everything on the barge."[9] (Tr. 39-40).

Claimant testified that following the alleged August 2003 accident, he no longer had "outward movement" of his arm above his head. He experienced intensified pain if he attempted such movements with his arm. (Tr. 38). He continued to discuss medical treatment with Mr. Dobbs after August 18, 2003, but was never provided medical attention. (Tr. 40-41, 43). Claimant wanted either medical attention or reinstatement of his health insurance. Claimant continued to work until September 23, 2003. (Tr. 44). His health insurance was reinstated on September 1, 2003. Claimant could not explain why he failed to seek medical attention for his left shoulder between September 1, 2003 and September 23, 2003. (Tr. 111-112).

On September 23, 2003, Claimant was working two jobs at Conoco. He received orders for two additional jobs and informed Mr. Fisher that he could not perform the two additional assignments. He indicated the jobs could not be performed "time wise" and because he "was hurting" and "tired from the time [he] got there." Mr. Fisher instructed Claimant to "turn in" his equipment. Claimant contends he did not quit. (Tr. 45-46, 117-120). Claimant "took the pages out of [his] book that [he had] worked . . . and put them in [his] pocket." He informed Mr. Fisher that he had not been able to seek treatment for his shoulder since his health insurance had been reinstated. According to Claimant, Mr. Fisher replied that the situation was no longer Employer's problem. (Tr. 47, 121-122). Claimant did not demand to have an accident report completed at that time. He also did not contact Mr. Johnson, human resources, the safety department, or Jay Gutierrez regarding treatment for his shoulder.[10] (Tr. 122-123).

[9] Prior to the alleged August 2003 accident, other employees accompanied Claimant only if they were in training. (Tr. 40).

[10] Jay Gutierrez was Employer's president and regional director. (Tr. 83).

Claimant first sought medical treatment in October 2003 at the emergency room at the LSU Medical Center Charity Hospital in Shreveport, Louisiana. The emergency room referred Claimant to an orthopedic doctor in their clinic. (Tr. 48). He visited the clinic on October 20, 2003, and was told to take "inflammatories." At that time, Claimant restricted his shoulder from "outward movement, forward, above [his] head movement." (Tr. 48-49). On cross-examination, Claimant stated he was truthful in his responses to his patient history, which indicated that his pain began **eight** months prior to the visit. (Tr. 114-115). He testified that he did not report the August 2003 accident to the physicians because he "didn't have time to go into detail." (Tr. 116).

In November 2003, Claimant sought additional treatment from Dr. Foret. (Tr. 49-50). Dr. Foret ordered an MRI and instructed Claimant not to return to work until after the MRI was performed. (Tr. 50). The MRI was performed on January 12, 2004. (Tr. 50-51; CX-2, p. 29). The MRI showed a "rotator cuff tear" and Dr. Foret recommended surgery to repair the tear. Dr. Foret was the first doctor to inform Claimant that he had a torn rotator cuff. (Tr. 51).

Claimant sought additional treatment at LSU following his consultations with Dr. Foret. At LSU, Claimant was treated by Dr. Chan, Dr. Day, and Dr. Sutton. He attempted physical therapy prior to surgery and ultimately underwent surgery at LSU Medical Center in Shreveport on September 20, 2004. (Tr. 51-52). Dr. James Day performed the surgery in which he repaired the rotator cuff tear.[11] (Tr. 52). Claimant testified that he was recovering well from the surgery and anticipated the scheduling of physical therapy. (Tr. 53).

Claimant has not worked since September 2003. He testified that he was assigned a restriction of "light duty" work with no climbing and restricted overhead movement. Claimant did not know if the restrictions were temporary or permanent. (Tr. 55).

On cross-examination, Claimant agreed that he was provided an employee handbook upon his hiring in May 2002. Claimant signed a document acknowledging that he read and understood the policies contained therein. (Tr. 60-61). Claimant underwent the same hiring routine when he was rehired in July 2003. (Tr. 71).

[11] Claimant did not recall the name of the surgery that Dr. Day performed. At hearing, Employer stipulated to the procedure reflected in the medical reports in the record. (Tr. 52).

Claimant was aware of "offsite" offices for Employer's human resources department and safety department. During his deposition, Claimant indicated that he would have to ask for telephone numbers in order to call those departments. At hearing, Claimant testified that he was not aware that the telephone numbers were posted on a bulletin board in the "inspector room." (Tr. 77-78). He also testified that he was not aware of an employee hotline and did not know the purpose of an employee hotline. He stated that he was never told about a hotline and did not recall seeing it in the handbooks. (Tr. 79).

Claimant testified that he received Employer's "Safety Training Policies and Procedures" and went through a training program. He received a certificate for the successful completion of the program. (Tr. 79-81; EX-1, p. 40). At formal hearing, Claimant was presented with copies of Employer's policies on accident prevention and agreed that he received the documents "if they was in the handbook." (Tr. 81-83; EX-1, pp. 37-39). Nonetheless, he indicated that he did not recall reading about the employee hotline. He further stated that he did not "recall probably eighty percent of the booklet, and [he did not] think anybody at that company can." (Tr. 84).

Claimant was aware that his health insurance was reinstated on September 1, 2003. (Tr. 111). He did not seek medical attention between September 1, 2003 and September 23, 2003. Further, Claimant testified that he did not seek medical attention from the time he sustained the injury on August 18, 2003 until October 20, 2003. (Tr. 112). He could not explain why he failed to seek medical care sooner. (Tr. 113). He also could not explain why he did not call Mr. Dobbs after his employment terminated to inquire "why he never followed through with what he promised to do." Claimant could not explain why he did not discuss alternative payment arrangements with Dr. Foret or why he did not request another loan from Employer. The idea of asking for a loan had not occurred to him.[12] (Tr. 113, 125).

Claimant did not receive any relief from Employer after September 23, 2003. Claimant was aware that Mr. Dobbs committed suicide in November 2003. He testified that it is coincidence

[12] In March 2003, Claimant asked Employer for and received a loan of $1,400.00. At that time, his disability had been terminated for the month of March and he still had not been released to work by Dr. Foret. (Tr. 74, 77).

that his claim for compensation was filed approximately one week after Mr. Dobbs's death. (Tr. 109-110).

Derrick Lognion

Mr. Lognion, who testified at formal hearing, was employed by Employer from October 2002 to March 2003 and from August 2003 to September/October 2003. (Tr. 135). During his second term of employment with Employer, Mr. Lognion was an inspector and worked with Claimant. He testified that Claimant experienced problems with his shoulder during that time. He indicated Claimant would not swing his arm when walking and kept it "pretty close" to his body. Mr. Lognion had prior work experience with Claimant and had never seen him carry his arm in such a manner. (Tr. 136-137). He testified Claimant did not move his arm and he did not observe Claimant attempt climbing activities. (Tr. 137).

Mr. Dobbs was Mr. Lognion's supervisor. He testified that he would report a work accident to Mr. Dobbs, who would then fill out an accident report. Mr. Dobbs would also send an injured employee to a doctor if necessary. To Mr. Lognion's knowledge the employee did not fill out the accident report. (Tr. 139).

Mr. Lognion testified that it was not routine for two inspectors to go on the same job unless "it was a big job." He could not recall why he was sent on jobs with Claimant during his second term of employment. The jobs lasted approximately a total of one-half of a day, but the time could be spread over "anywhere from one day to three or four days." Mr. Lognion did not consider these jobs to be "big" jobs. (Tr. 140, 143-144). He testified that Claimant tried to do his job and affirmed that Claimant had "obvious problems" performing his tasks. (Tr. 141).

On cross-examination, Mr. Lognion testified that he worked with Claimant during training. During his second term with Employer, Mr. Lognion only worked with Claimant twice and was not aware of Claimant's condition on the other days. He did not know if Claimant's pain was the result of an incident in 2002 or in 2003. (Tr. 141-142).

Terri Byrd

Ms. Byrd, who testified at formal hearing, is Claimant's fiancée. She has known Claimant since November 2002. She saw

Claimant every other weekend before moving in with him on April 30, 2004. (Tr. 150).

She testified Claimant had "some pain" in his left shoulder in November 2002 and he was not under doctor's care to her knowledge. (Tr. 146). Claimant was on "short-term disability" in November 2002 and returned to work in March 2003. (Tr. 147). However, she did not know who placed Claimant on "short-term disability," nor did she know why he was on disability. (Tr. 150-151). She testified Claimant experienced pain in his left shoulder between March 2003 and August 2003. (Tr. 152). She testified that Claimant's left shoulder was "fine" from March 2003 to August 2003, although he occasionally complained of pain.[13] (Tr. 147).

According to Ms. Byrd, Claimant's shoulder problems increased following his accident in August 2003. She noticed that Claimant could not lift his arm after August 2003. She testified that "he couldn't go to the side or anything . . . it basically stayed here against his stomach (indicating)." (Tr. 148).

Ben Gentry

Mr. Gentry, who testified at formal hearing, was employed by Employer as an inspector in August 2003 and was a dispatcher for Employer at the time of formal hearing. Mr. Gentry had occasion to work with Claimant during his tenure with Employer. He could not recall Claimant injuring himself in August 2003, although he knew Claimant suffered from left shoulder pain "in the past." (Tr. 154-156). Mr. Gentry did remember Claimant saying that he injured his shoulder while "sampling something one time." (Tr. 160).

Mr. Gentry did not remember seeing Claimant hold his shoulder in a guarded fashion. He did not recall Claimant specifically stating that his shoulder hurt. (Tr. 161-162).

In August 2003, Mr. Gentry was an inspector and his supervisors were "Kenny, then Morgan [Fisher], and Chris {Dobbs]."[14] Although Mr. Dobbs was the "head guy in Sulphur," Mr. Gentry stated he would go to one of the other supervisors if Mr. Dobbs was not available. (Tr. 163).

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[13] She stated Claimant could "do anything basically." (Tr. 147).

[14] Mr. Gentry's testimony does not provide a last name or job title for "Kenny."

As an inspector, Mr. Gentry would climb 60-foot staircases to climb up the tanks. He would also climb inside crude oil tanks to determine the level of the product. The crude oil tanks were equipped with floating staircases that would be at a steep angle if there was a low level of fluid inside the tank. (Tr. 164-165). An inspector would have to reach "above" to get out of the tank. Mr. Gentry testified the inspectors carried samples and equipment weighing approximately 20 pounds. (Tr. 165).

Mr. Gentry testified that company policy required reporting work accidents to an employee's supervisor. The supervisor prepares the accident report based on the information provided by the employee. (Tr. 162-163). The employee would provide the "where, when, how, the extent of the injury . . . if you have to get medical attention, or so on and so forth." Mr. Gentry testified that he would want to be present when the accident report is filled out to "protect" himself. (Tr. 168-169). Additionally, Mr. Gentry testified that he would have first reported an accident at the facility where it occurred because company policy required a record of the injury at the place of the accident. (Tr. 166).

Donald G. McCoy

Mr. McCoy testified at formal hearing and has worked for Employer since January 1988. He was an inspector at the time of trial, as well as at the time of Claimant's August 2003 injury. He has worked with Claimant. (Tr. 170).

Mr. McCoy testified that he was aware Claimant experienced "ongoing" shoulder pain before and after August 2003. (Tr. 172). Prior to August 2003, Claimant complained to Mr. McCoy of pain in his shoulder/rotator cuff while driving to an assignment in Beaumont, Texas. (Tr. 171). The trip to Beaumont could have occurred as early as November 2002. (Tr. 173). While performing the assignment in Beaumont, Texas, Claimant was able to perform his job tasks, which included climbing, without any problems.

Mr. McCoy testified that he would report a work accident to his supervisor. In August 2003, his supervisor was Mr. Dobbs. (Tr. 174). Mr. Dobbs would then prepare an accident report pursuant with Employer's policy. Failure of a supervisor to complete an accident report would be a violation of Employer's policy and procedures. (Tr. 175). Mr. McCoy testified that he would assist the supervisor in completing the accident report

and would make sure the report was completed. If the supervisor failed to complete the report, Mr. McCoy stated he would approach the supervisor's supervisor. (Tr. 175-176).

Mr. McCoy identified Mr. Johnson as his manager's supervisor. He indicated that Mr. Johnson visits the office "once every couple of months" and that Mr. Johnson considers safety a high priority. (Tr. 176).

Mr. McCoy testified that he is aware of an employee hotline through the handbooks and postings throughout the office. Additionally, the telephone numbers for human resources and the safety department are posted. (Tr. 177).

Michael R. Devall

Mr. Devall, who testified at formal hearing, is the president and owner of Devall Enterprises. He considers himself a "hands-on manager" who is aware of almost everything that occurs within the company. He testified that he regularly communicates with the tugboat captains and deckhands because it is important to know if accidents occur on his premises. (Tr. 179-180).

The company maintains a safety policy whereby all personal injuries are reported. His employees are instructed to report any accidents they witness, whether or not the accident involves an employee of Devall Enterprises. (Tr. 181-182). A deckhand would report an accident to his captain, the captain would report it to the dispatcher, and the dispatcher would report it to Mr. Devall. The reporting process would also generate documentation of the procedure. (Tr. 183). He testified that he would expect the accident described by Claimant to be reported by "someone." (Tr. 182-183, 187). He would expect Claimant to report the accident to his own employer. (Tr. 187). He would not expect Claimant's supervisor to report the accident to Devall Towing. (Tr. 188).

Mr. Devall has no knowledge of an employee of any inspection company sustaining an injury and reporting an accident to his company. Approximately one month prior to formal hearing, Mr. Devall first became aware that Claimant claimed an injury at his facility. He reviewed the records at Devall Fleet and found no report or documentation of an accident involving Claimant on August 18, 2003. (Tr. 183-184). He also interviewed "everyone who should have had knowledge of an

alleged accident." No one had knowledge of Claimant's accident. (Tr. 185).

Mr. Devall did not know exactly which boat was involved in Claimant's accident; he further did not know the name of the deckhand or captain who were present on the vessel at the time of the accident. (Tr. 185, 189). He brought the issue up at a weekly meeting and received no response. (Tr. 185). On cross-examination, he agreed that the meeting was not attended by everyone who was employed in August 2003 due to "turnover." (Tr. 190). Based on his investigation, Mr. Devall concluded that an accident did not occur as far as his company was concerned. However, he also testified that he "can't say that [Claimant] didn't" have an accident at Devall Fleet. (Tr. 185).

Robert L. Johnson

Mr. Johnson testified at formal hearing. He is Employer's regional vice-president and held that position in August 2003. As regional vice-president, Mr. Johnson supervises 12 offices and the branch managers report directly to him. (Tr. 191). He considers himself a "hands-on" manager. Mr. Johnson testified that he visits the Louisiana branches once a month to once every six weeks. He maintains an "open door" policy whereby the employees know him and have access to raise concerns with him. (Tr. 192-193).

Mr. Johnson provided the following hierarchy from his position down for the Lake Charles office: a branch manager, an operations manager, a lab manager, a dispatcher, and a coordinator. (Tr. 193). He testified that employees are aware of the hierarchy of supervisors. (Tr. 194).

Mr. Johnson testified that Employer maintains an offsite human resources department to address issues regarding administrative support, 401K, insurance and employee problems. The telephone number for the human resources department is posted on a bulletin board in the "inspector's room." (Tr. 194-195). He further testified that Employer maintains an offsite safety department with a national safety director. Mr. Johnson also has an "area quality and safety manager" who would visit the Lake Charles office once every couple of months or as deemed necessary by Mr. Johnson or the manager. (Tr. 195). The employees had regular access to the safety manager. The safety telephone numbers were also posted on the inspector's bulletin board. (Tr. 196). Additionally, each employee received a card containing the anonymous "1-800 number" for the employee

hotline. The hotline was available for complaints or issues on anything from ethics to safety to harassment. (Tr. 196-197).

Employer has a safety policy which requires that accidents be reported immediately. The injured person bears the responsibility of reporting the accident to his supervisor. The supervisor then fills out the accident report with the employee's assistance. (Tr. 198). If the supervisor fails to complete the accident report, the employee must "go over his head" or call the safety department or employee hotline. Mr. Johnson testified there is no incentive to not report an accident, but the failure to report an accident would result in an employee's termination. (Tr. 199-200). On cross-examination, he agreed that the supervisor is responsible for taking information and completing the written report. He also agreed that an employee should not need to call the human resources department, the safety department, or the hotline if the supervisor properly performs his job. (Tr. 213-214).

Mr. Johnson testified that there was a misunderstanding as to Mr. Dobbs being Claimant's "direct supervisor." In August 2003, there was a branch manager, an operations manager, and a dispatcher. According to Mr. Johnson, the direct supervisor at that time "could have been one of those three people." (Tr. 199). The "direct" supervisor could have been the operations manager or the dispatcher, depending on who was actually dispatching the inspectors at a given time. While Mr. Dobbs was "ultimately responsible" for the branch, he may or may not have been "directly supervising or dispatching inspectors." Nonetheless, Mr. Johnson did not have an objection to employees reporting injuries directly to Mr. Dobbs. (Tr. 216-217).

Mr. Johnson was Mr. Dobbs's direct supervisor. (Tr. 201). Mr. Dobbs had "overall responsibility" for the Lake Charles office and employees, from the operations to the administration. (Tr. 201-202). Mr. Dobbs received promotions, positive reviews, and was a responsible person. He was trained in safety with knowledge of Employer's safety policies. (Tr. 203-204).

Mr. Johnson expected that Mr. Dobbs would have filed an accident report if Claimant had reported an accident because Mr. Dobbs would have had "all the incentive to report it." (Tr. 205-206). Mr. Johnson had no doubt that Mr. Dobbs knew the failure to report an accident would result in his termination. (Tr. 204). Mr. Johnson had no knowledge of Mr. Dobbs being on probation in August and September 2003; Mr. Johnson testified that he would have been the person to put Mr. Dobbs on probation

should it have occurred. (Tr. 205-206). Mr. Johnson testified that Mr. Dobbs experienced personal problems and committed suicide on November 11, 2003. (Tr. 204-205). Mr. Johnson did not observe a change in Mr. Dobbs's work performance between the time he became branch manager and the time of his suicide. Mr. Dobbs continued to timely complete all "month end" reports. (Tr. 223).

Mr. Johnson testified that Claimant had previously received a loan from Employer, but did not ask for a loan after August 2003. Employer would not have restricted the manner in which Claimant used the loan. (Tr. 207). On cross-examination, Mr. Johnson indicated he did not think it was reasonable for an employee to request a loan for medical treatment of a work injury. He stated that such an injury would not cost an employee anything because it would be a workers' compensation injury. (Tr. 221).

Claimant was terminated from employment prior to August 2003 when he "came up missing" for four days while in Shreveport, Louisiana.[15] Mr. Dobbs and Mr. Fisher could not contact Claimant and human resources became involved. According to Employer's policy, an employee "automatically" quits his job when he is "out of touch" for three days. (Tr. 208). Claimant was reinstated shortly thereafter and performed his regular job duties. (Tr. 209, 219). Mr. Johnson testified that Claimant's health care benefits would have been reinstated on September 1, 2003, as it was "the first of the month following a full . . . month of employment." (Tr. 209-210).

A "Report of Industrial Injury" was completed on January 20, 2004, after Employer received its first notice of the claim from the U.S. Department of Labor (DOL). (Tr. 205, 211; EX-1, p. 1). According to the report, Claimant's accident occurred on August 16, 2003 and it stated that Employer had knowledge of a pre-existing left shoulder injury sustained in a boating accident. (Tr. 212; EX-1, pp. 4-5). Mr. Johnson testified that the boat injury was not work-related and he had no knowledge of what injuries were sustained from the accident. (Tr. 220).

Mr. Johnson testified that Claimant performed his normal job duties through September 23, 2003. He also testified Employer would have taken "immediate action" about his accident/injury, if Claimant had contacted him, the safety

[15] Employer's "Payroll Authorization Form" stated the reason for termination as being "unable to reach him for four days." (Tr. 209; EX-1, p. 36).

department, the human resources department, or the employee hotline. (Tr. 212-213).

Morgan Fisher

Mr. Fisher, who testified at formal hearing, is the branch manager of Employer's Lake Charles, Louisiana office. In August 2003, Mr. Fisher was employed as the operations manager for the Lake Charles office. Mr. Dobbs was his immediate supervisor and Kenneth Broussard and the inspectors were below him.[16] (Tr. 227-228). As the operations manager, Mr. Fisher's duties included coordinating the operations at the office, overseeing operations in the field, and general responsibility for any problems in the field operations, including safety. (Tr. 229).

Mr. Fisher testified he was Claimant's supervisor and Claimant should have known to approach him with any problems. He acted upon problems reported to him by other employees in the past. (Tr. 230-231).

Mr. Fisher coordinated safety training for the branch office. He testified Claimant satisfactorily completed the safety training program. According to Mr. Fisher, an employee must immediately notify the "terminal" where an injury occurs and then immediately notify the supervisor "at the office." If an employee needs medical attention, he is sent to a doctor. Company policy requires a drug and alcohol screen. (Tr. 231). Additionally, the employee must meet with his supervisor to complete, review, and sign an accident report. (Tr. 232).

Mr. Fisher testified that Claimant was not working on August 16, 2003, the date originally listed as the date of the accident. Mr. Fisher was working on August 16, 2003, and testified that he and Mr. Dobbs would commonly be seated at a back table completing paperwork. (Tr. 232-233). He agreed that an inspector carries an average of 20 pounds, which can be managed over several trips. (Tr. 235). Usually, one inspector is assigned to each job.[17] (Tr. 235-236).

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[16] Mr. Broussard was the dispatcher and field supervisor. (Tr. 229).

[17] On cross-examination, Mr. Fisher testified that a single inspector is sent on a job, unless it is a "big job" such as "crude ships" or "product ships." A "barge job" would usually require only one inspector; however, one customer, Lyondale, requires two inspectors if there are fifteen or more tanks "between his barges." (Tr. 252-253). Employer performed jobs for Lyondale between August 2003 and September 23, 2003. Mr. Fisher testified that it was possible that Claimant was accompanied by Mr. Lognion while completing jobs for Lyondale. (Tr. 257).

Employer assigned work to inspectors on a "rotation basis," where the first employee to complete a job is first in line for the next available assignment. Inspectors commonly work around the clock. When the inspectors work around the clock, the person with the "most time off" gets the next assignment. (Tr. 233-234). On September 23, 2003, Employer's inspectors were working around the clock and Claimant had the most time off on that day. (Tr. 234-235).

Mr. Fisher was aware Claimant returned to work in March 2003 after being on short term disability for a pre-existing left shoulder condition. Claimant complained of left shoulder pain on "an on-going basis" following his return to work. (Tr. 236-237). Despite his complaints of pain, Claimant did not demonstrate difficulty using his left shoulder and continued to perform all duties between March 2003 and August 2003. Mr. Fisher would not have allowed Claimant to continue his tasks if he posed a danger to himself or others. (Tr. 248-249).

Mr. Fisher testified that Devall Fleet did not report an accident involving Claimant and that he would have been aware of such a report being made to Employer. (Tr. 237). He also testified that Claimant did not report an accident, in his presence, to Mr. Dobbs on August 18, 2003.[18] If Claimant had made such a report, an accident report would have been completed and Claimant would have seen a doctor. Mr. Fisher testified that he would have handled the matter if Mr. Dobbs failed to do so. (Tr. 238). He did recall Claimant entering the office on August 18, 2003 and talking to Mr. Dobbs, but he could not recall at what time the discussion occurred. (Tr. 251)

Mr. Fisher did not know of or hear of Claimant making continued requests for Mr. Dobbs to complete an accident report or provide medical treatment; however, he also testified that he was not present for every conversation between Claimant and Mr. Dobbs. (Tr. 239, 249-250). Claimant did not inform Mr. Fisher that he was having problems attaining medical treatment or completing an accident report. Claimant did not ask Mr. Fisher to complete an accident report or assist him in obtaining medical treatment, although they spoke on a nearly daily basis. (Tr. 239). If Claimant had informed Mr. Fisher that Mr. Dobbs would not complete an accident report, Mr. Fisher would have taken responsibility to have the report filed and to have Claimant sent to a doctor. Mr. Fisher testified that he would

[18] Mr. Fisher indicated he would have remembered an employee complaining of a work injury. (Tr. 258). His testimony does not reflect whether Claimant requested medical treatment of Mr. Dobbs in his presence on August 18, 2003.

be reprimanded for his failure to report an accident. This policy was known by all employees in the Lake Charles office. (Tr. 240-241, 252).

According to Mr. Fisher, Claimant made the same complaints of left shoulder pain before and after August 18, 2003. (Tr. 242). Mr. Fisher testified Claimant performed his normal job duties between August 18, 2003 and September 23, 2003. Claimant was placed on the "normal" job rotation and received "normal" assignments and performed "normal" lifting. Mr. Fisher was not aware of a request for job accommodations, but indicated that he would not necessarily know if Claimant made such a request. Nonetheless, he was not aware of any accommodations being provided to Claimant. (Tr. 241-242). He testified that the fact Claimant did perform his regular duties indicated Claimant was not a danger to himself or others. (Tr. 258).

Claimant was terminated from employment on September 23, 2003. Mr. Fisher testified Employer was busy on September 23, 2003, and Claimant had the most sleep/time off among the inspectors. (Tr. 243). On cross-examination, Mr. Fisher stated Claimant was "off" for twelve hours prior to finishing his afternoon job. However, Mr. Fisher did not have a document to reflect Claimant's hours. (Tr. 254-255). Claimant's timesheets would be the "best evidence" of his work, but he did not submit his timesheets for his last few days of employment. (Tr. 256-257).

Mr. Broussard informed Claimant of another assignment at the same dock and facility where Claimant was working. Mr. Fisher testified Claimant told Mr. Broussard that he would "turn in his equipment and threatened to whip [Mr. Fisher's] butt" if he had to begin the next assignment. (Tr. 244-245). Claimant telephoned Mr. Fisher and indicated he would turn in his equipment if he "had to start the next set of barges." Mr. Fisher "accommodated what he was offering" and told Claimant to turn in his equipment. (Tr. 245). Mr. Fisher testified that Claimant dumped his samples, tore his paperwork, and refused to hand over his "tally book." (Tr. 246). Mr. Fisher also testified that Claimant would have continued to be employed if he had not "offered" to quit. (Tr. 245-246).

Mr. Fisher testified that Claimant did not report an accident to Employer between August 18, 2003 and September 23, 2003. He further indicated that Claimant did not mention his shoulder problem, mention shoulder pain, or ask for medical treatment on September 23, 2003. Mr. Fisher did not tell

Claimant he was no longer Employer's problem. (Tr. 246-247, 252).

He testified that he would have recalled a report of an accident by Claimant if made in his presence. He further testified that such a report "would have been acted upon." He had no knowledge of Claimant requesting an accident report or medical treatment anytime after August 18, 2003. (Tr. 259-261).

The Medical Evidence

Dr. Lynn Foret

Dr. Foret, a board-certified orthopedic surgeon, was deposed by the parties on October 28, 2004. (CX-1). He first examined Claimant on November 6, **2002.** Claimant filled out a "patient injury/illness" questionnaire in which he indicated he suffered from shoulder pain and numbness in his arms and hands. Claimant also indicated that he sustained a "possible trip and fall" at the Exxon-Mobil facility in Beaumont, Texas. (CX-1, pp. 9-10; CX-2, p. 39). Claimant informed Dr. Foret that he began experiencing shoulder pain after "he caught himself" with his hands, arms, and upper body. Dr. Foret agreed such an accident would be considered a "traumatic injury" that could cause shoulder problems such as a rotator cuff tear or inflammation. (CX-1, pp. 10-11).

Claimant did not provide a date of the fall at Exxon-Mobil, but his patient history suggested that he began experiencing left shoulder pain approximately one year prior to the November 6, 2002 visit.[19] (CX-1, p. 11; CX-2, p. 18). Consequently, Dr. Foret could not opine whether Claimant's shoulder pain resulted from a gradual or acute onset of pain. (CX-1, p. 11). Dr. Foret noted Claimant's pain began approximately one year before the visit and worsened over the few months prior to the examination. Claimant exhibited poor "internal-external rotation of the left shoulder" and "crepitus and grinding." (CX-2, p. 15). Dr. Foret did not diagnose Claimant's condition because he was awaiting an MRI. However, he did "inject" Claimant's shoulder and placed him off work. (CX-1, p. 13; CX-2, pp. 15-16, 27).

[19] Dr. Foret's medical report of November 6, 2002, specifically lists numbness in Claimant's left shoulder, arm, and fingers. It also indicates that Claimant experienced pain and tightness in his shoulder when lifting his arm to shoulder height. Claimant also complained of a dull ache in his posterior shoulder area. (CX-2, p. 18).

On November 14, 2002, Dr. Foret obtained an MRI of Claimant's shoulder, which revealed "low grade tendinopathy and peritendinitis of the supraspinatus without rotator cuff tear." (CX-2, p. 31). The tendons of Claimant's rotator cuff were inflamed and irritated, which Dr. Foret indicated was commonly seen in Claimant's age group and not usually related to trauma. Claimant's rotator cuff appeared to be intact, but it was possible to miss a small tear on an MRI. (CX-1, pp. 14-16). However, Dr. Foret stated it was unlikely that the radiologist missed a rotator cuff tear and testified that "there wasn't a tear on the initial MRI, on the second MRI there was." (CX-1, pp. 43, 47).

The MRI also revealed "a millimeter-sized juxtalabral cyst likely secondary to a small superior labral tear which is not directly visualized." (CX-1, pp. 16-17). According to Dr. Foret, the cystic area was a "coincidental" finding and was normal in working men who use their shoulders. He considered the cystic lesion to be "more of a degenerative change in the labrum." While the cystic lesion with the labral tear "should" be an impairment of the shoulder, Dr. Foret opined that it was "so small that it might not have any affect" on Claimant. (CX-1, pp. 17-18).

On November 22, 2002, Claimant presented with complaints of pain in his shoulder when lifting objects. He continued to complain of a dull ache in his posterior shoulder. (CX-2, p. 14).

At his deposition, Dr. Foret indicated Claimant's inflammatory condition weakened the "ligamentous structures of the joint" and placed Claimant at risk to "tear or damage some of the structures in the joint." Dr. Foret diagnosed Claimant with "adhesive capsulitis" which referred to Claimant's inflamed shoulder joint. He described the condition as "very painful." (CX-1, p. 19).

On January 10, 2003, Claimant presented with a burning feeling in his left shoulder. He also complained of pain when lifting his arm. Claimant was able to "reach out" with little pain. (CX-2, p. 13). Dr. Foret diagnosed Claimant with "rotator cuff tendonitis on the left side." He again injected the shoulder and prescribed Vioxx. Claimant remained off work. (CX-1, p. 20; CX-2, pp. 12, 24).

On February 25, 2003, Claimant presented with complaints of left shoulder pain and indicated that his shoulder began hurting

one week after he received the injection. (CX-1, p. 20; CX-2, p. 9). Claimant reported walking a dog on a leash and feeling a "pop" in his left shoulder when the dog "pulled." He reported a burning and tingling sensation in his shoulder afterwards. (CX-2, p. 9). At his deposition, Dr. Foret opined that such an event would cause "significant pain." While the "pulling" could cause a rotator cuff tear, Dr. Foret suggested that it was unlikely to occur.[20] (CX-1, pp. 21-23).

He diagnosed Claimant with "chronic inflammatory changes and early adhesive capsulitis changes." He also diagnosed "low grade tendinopathy," peritendinitis and cystic area," and a small superior labral tear." Dr. Foret's diagnoses were based on a "carryover from the MRI results," as well as an examination of Claimant. (CX-1, p. 24; CX-2, p. 7).

On March 18, 2003, Dr. Foret released Claimant to return to full-duty work. (CX-2, p. 6). At his deposition, he could not recall the circumstances surrounding the work release. He indicated Claimant likely requested the release. He further opined Claimant's condition would not have resolved by March 2003, so Claimant's shoulder pain likely continued. (CX-1, pp. 24-26). Dr. Foret did not assign a permanent partial impairment rating to Claimant's left shoulder in March 2003. However, at his deposition, he opined that he would have assigned Claimant approximately a 10% impairment rating as of February 2002. (CX-1, pp. 26-27).

On November 19, 2003, Claimant returned to Dr. Foret. Claimant reported feeling a "snap" or "tear" in his shoulder when getting into a tugboat in August. He complained that his condition "progressively got worse" to the point that he could not lift his arm without pain. Dr. Foret noted swelling in his hands. (CX-1, p. 28; CX-2, p. 5). The medical report noted that Claimant was "unable to lift his left arm up" and noted Claimant experienced severe pain. Dr. Foret declined to diagnose Claimant's condition until an MRI was performed. (CX-2, p. 4). He took Claimant off work "until further notice." (CX-2, p. 20).

During Dr. Foret's deposition, he stated that "it's unusual to injure a rotator cuff in a pulling incident . . . versus a slip and fall where you have to use the rotator cuff to brace yourself." He further testified that "[y]ou can't pop it by

[20] Claimant did not undergo another MRI until January 2004. Dr. Foret could not confirm whether the dog walking incident caused a rotator cuff tear. (CX-1, p. 22).

reaching out and grabbing something . . . [i]t's when you're contacting and you fall and your body weight has to be held up." (CX-1, p. 29). He opined that Claimant could have torn his rotator cuff by falling and grabbing the side of a boat to hold himself up during a fishing trip with his son where he injured his left ribs. (CX-1, p. 31).

Dr. Foret testified that, based on the accident history provided by Claimant and the lack of shoulder abduction, he assumed that Claimant sustained a rotator cuff tear in August 2003. (CX-1, pp. 52-53). Dr. Foret's report reflected that Claimant was still having problems with his shoulder, but Dr. Foret awaited an MRI before diagnosing Claimant's condition. Dr. Foret indicated, however, that "something's happened to the rotator cuff." He noted that Claimant had shoulder pain during his prior visits, but was able to "abduct his shoulder up." At the November 2003 visit, Claimant could not lift his arm. He opined that when a patient cannot move his shoulder upwards and suffers from severe pain, it is an indication of "more than a tendonitis of the shoulder." He opined the limited arm movement suggested a rotator cuff tear.[21] (CX-1, p. 32, 45).

On January 12, 2004, Claimant underwent a second MRI which revealed "a partial thickness laminar-shaped rotator cuff tear and a mid posterior supraspinatus position." (CX-1, p. 33; CX-2, p. 29). Dr. Foret explained the MRI findings as follows:

> That means that the rotator cuff that attaches to the greater tuberosity of the humerus is torn in the midportion and also going posterior to that portion and it's actually pulled off the bone there. And so there's – in the front portion the tendon is inflamed, but the middle portion and the back portion have started to tear off the bone.

(CX-1, p. 33).

The MRI also showed "infraspinatus tendinopathy" which referred to "inflammation of the front portion of the tear and was consistent with the prior MRI. (CX-1, p. 33). Dr. Foret indicated that the MRI simply shows that a tear is present and does not reveal when the tear or inflammation occurred in the joint. (CX-1, pp. 34-35). He could not testify whether or not Claimant was injured in an accident on August 18, 2003, but can state that a rotator cuff tear occurred sometime between

[21] Dr. Foret testified he would release a patient to work with a rotator cuff tear, if the patient was asymptomatic. (CX-1, p. 46).

November 14, 2002 and January 12, 2004. (CX-1, p. 60).

Dr. Foret noted Claimant's two MRIs were read by the same radiologist. He stated that "it's a pretty good bet that there wasn't a tear there back in 11/14/02 and then later on, for the '04 MRI, the tear was there." (CX-1, p. 47). However, he could not opine whether an MRI in August would have been "positive or negative" for a rotator cuff tear. He indicated that Claimant probably did not have a rotator cuff tear at the March 2003 release to work because Claimant was able to "abduct" his arm from his body and did not have the pain associated with a rotator cuff tear.[22] Further, Claimant's ability to perform his job would be consistent with the absence of a tear. (CX-1, p. 49).

On January 21, 2004, Dr. Foret rendered a diagnosis that repeated the findings of the January 12, 2004 MRI. He planned to schedule Claimant for an arthroscopy and an arthroscopic repair. (CX-1, p. 36; CX-2, p. 2).

Dr. Foret does not know and does not have any documentation to reflect whether Claimant requested an examination between August 18, 2003 and November 19, 2003. At the time of his deposition, he had not been provided with the records of Claimant's shoulder surgery in Shreveport, Louisiana. He opined that Claimant would be able to perform medium level duty with restrictions approximately three months following the surgery. (CX-1, pp. 37-38).

Dr. Foret found Claimant to be "candid and straightforward" about his shoulder pain. His complaints were consistent with the physical examinations and diagnostic tests. (CX-1, p. 54). He agreed that rotator cuff tears differ on individuals and each person is affected in a different manner, depending on the amount of pain and restriction of motion caused by the tear. (CX-1, p. 58).

If Claimant's job required carrying an average of 20 pounds and work at waist level or below, Dr. Foret would not object to Claimant performing his job after August 18, 2003. He further would not be surprised that Claimant could perform his job duties. (CX-1, pp. 38-39). However, he also testified that Claimant's shoulder condition would be "aggravated" if Claimant abducted his shoulder to lift or pull himself onto a vessel.

[22] The "labral tear" reflected in the November 2002 MRI would not restrict arm abduction. (CX-1, p. 50).

(CX-1, pp. 55-56). He opined it would be difficult for a person to perform such activities with a painful rotator cuff tear and he would limit "vertical climbing" activities for a person with a rotator cuff tear. He would also limit lifting, lifting from the side, and lifting more than 10 pounds from a shelf. (CX-1, p. 57). However, if Claimant could perform his regular job tasks, those restrictions might not be applicable to him. (CX-1, p. 64).

Dr. Foret agreed that Claimant had a permanent partial disability to his shoulder during his first period of treatment. He also agreed Claimant's condition would worsen over time due to degenerative conditions; Dr. Foret agreed he expected arthritis and ongoing pain. He opined Claimant had a 10% permanent partial impairment at the time of Claimant's first treatment. (CX-1, pp. 40-41). Dr. Foret also agreed that a second injury would have "materially and substantially combined with the pre-existing injury to create a greater degree of disability than would have existed with a second injury alone." However, he could not predict Claimant's current impairment rating. (CX-1, p. 41).

Dr. Foret did not treat Claimant between August 18, 2003 and November 19, 2003. He testified that Claimant's failure to seek medical treatment and to continue working "could raise some suspicion." However, Dr. Foret also testified he would "wonder if this guy is real tough and can put out the pain and is the bread winner and has to do it or did the inflammation let up any." He testified that, for "the majority of the time," injured patients call in for medication and continue to work. He indicated that "probably a very small percentage" actually seek medical attention. (CX—1, p. 62). Dr. Foret testified that a patient with a rotator cuff tear would seek pain medication. His records reflected Claimant sought Lorcet prescriptions on November 19, 2003, and on December 3, 2003. (CX-1, p. 63).

LSU Health Sciences Center

On October 14, 2003, Claimant first sought treatment at the LSU Medical Center emergency room in Shreveport, Louisiana. Claimant presented with complaints of shoulder pain. The report noted Claimant had a history of a shoulder injury in the previous October and was placed off work for six months by his treating orthopedist. Claimant indicated the shoulder pain continued after his return to work in March 2003. Claimant was diagnosed with "shoulder pain" and provided with discharge

instructions for "sprain, shoulder." The report does not reflect an accident in August 2003. (CX-3, pp. 23-24).

On October 20, 2003, Claimant received treatment from the "ortho" clinic at LSU Medical Center. He presented with complaints of left shoulder pain that began **eight** months prior to the visit. Claimant described the pain as occurring "most of the time" and worse with movement. The "findings" of the visit noted the shoulder pain began one and one-half years prior to the visit. Claimant reported limited motion and receipt of cortozone injections. He complained of numbness in his arm and forearm, along with neck pain. The medical record does not reflect a report of an August 2003 accident and injury. (CX-3, p. 22)

On April 30, 2004, Claimant underwent a "left shoulder impingement series." The "report of radiological findings" found "AC joint arthritis and findings consistent with impingement." (CX-3, p. 9). An "ortho" clinic report of April 30, 2004, indicated Claimant complained of left shoulder pain beginning **six** months prior to the visit. It described the pain as "constant" and worse with movement. The report did not reflect an accident in August 2003, but did note an "injury at work" and left shoulder pain since August 2003. (CX-3, p. 8).

On May 15, 2004, Claimant sought treatment at the LSU Medical Center emergency room in Shreveport, Louisiana. He presented with complaints of right hand pain after falling on his hand. Claimant was diagnosed with a hand contusion. (CX-3, p. 15). A "report of radiological findings" revealed "soft tissue swelling with no evidence of fracture dislocation." (CX-3, p. 13).

Claimant received physical therapy on May 27, 2004, June 3, 2004, and June 10, 2004. The report dated May 27, 2004, dated the onset of pain to August 2003, following a slip and fall. Claimant reported receiving a recommendation of surgery after an MRI revealed a torn rotator cuff. An appointment was set with the "ortho clinic" for July 19, 2004. The May 27, 2004 physical therapy report noted Claimant experienced a "sharp, shooting pain" that "comes and goes." It further noted tenderness around Claimant's left shoulder. (CX-3, p. 6).

An "outpatient clinic record" dated July 19, 2004, noted Claimant began experiencing left shoulder pain in August 2003. He reported a "sharp tearing pain while at work." Claimant was diagnosed with (1) left shoulder impingement syndrome, (2)

supraspinatus tear, and (3) acromioclavicular arthritis of the left shoulder. The report also noted Claimant sustained a "left shoulder rotator cuff tear." Claimant was scheduled for surgery on September 20, 2004, with "preop" on September 13, 2004. (CX-3, p. 3). A report from the "ortho" clinic dated July 19, 2004, echoed the complaint of left shoulder pain beginning in August 2003. (CX-3, p. 4).

On September 13, 2004, Claimant reported to the "ortho" clinic for "preop." (CX-3, p.45). He presented a history of left shoulder pain beginning in August 2003. Claimant reported that he fell at work and used his left arm to catch himself. Claimant felt and heard a pop. (CX-3, p. 50).

The operative report, dated September 20, 2004, indicated that Claimant underwent a "Mumford subacromial decompression and partial thickness rotator cuff repair." Dr. James Day performed the surgery. The findings revealed a "small rotator cuff tear of non-consequence" and "no cartilage in the AC joint and tight subacromial space." (CX-3, pp. 65-66). On October 4, 2004, Claimant returned to the "ortho" clinic for post-surgery follow-up. (CX-3, p. 39).

On November 1, 2004, Claimant was restricted to lifting of no greater than 25 pounds and avoidance of "strenuous overhead activity." Climbing activities that involved use of his left arm were restricted, as well. The restriction report also suggested Claimant would be released to "all activities" on December 13, 2004. (CX-8, p. 1).

The Contentions of the Parties

Claimant contends he sustained a left shoulder injury on August 18, 2003, when he was involved in an accident at Devall Fleet. He argues that Employer was not prejudiced by his failure to provide written notice of the accident because he notified his direct supervisor on the day the accident occurred. Claimant contends he is entitled to payment for past and future medical expenses. He seeks temporary total disability from September 23, 2003 through present and continuing.

Employer contends the present claim is barred under Section 12(a) of the Act because it was prejudiced by Claimant's failure to timely provide written notice of the alleged accident. Employer further contends Claimant was not involved in a work-related accident on August 18, 2003. Further, Employer argues Claimant is not entitled to temporary total disability benefits

because Claimant was able to continue performing his "normal" job functions following the alleged injury.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Claimant's Credibility

An administrative law judge has the discretion to determine the credibility of witnesses. Furthermore, an administrative law judge may accept a claimant's testimony as credible, despite inconsistencies, if the record provides substantial evidence of the claimant's injury. Kubin v. Pro-Football, Inc., 29 BRBS 117, 120 (1995); see also Plaquemines Equipment & Machine Co. v. Neuman, 460 F.2d 1241, 1243 (5th Cir. 1972).

Employer identified several inconsistencies in Claimant's testimony in its post-trial brief and at formal hearing. These inconsistencies arguably bear on Claimant's credibility regarding the fact of an accident or injury, as well as Claimant's credibility regarding timely notice of a work-related incident.

At the outset, it is noted that Claimant provided inconsistent dates for the occurrence of the alleged accident. Claimant completed an LS-203 form on his own behalf and identified the date of accident as August 16, 2003. Subsequently, Claimant remedied his error by notifying Employer that the accident actually occurred on August 18, 2003. Employer's records confirm that Claimant did not work on August 16, 2003, but did perform an inspection at Devall Fleet on August 18, 2003. According to Claimant's testimony, he corrected his LS-203 form after reviewing his "tally book," which by his own admission had been lost prior to Employer's request for the document and prior to hearing.

Additionally, Claimant testified at formal hearing that Mr. Fisher was present on August 18, 2003, when he reported the accident to Mr. Dobbs. However, Mr. Fisher provided contradictory testimony. According to Mr. Fisher, Claimant did in fact speak with Mr. Dobbs in his presence on August 18, 2003, but Claimant did not report an accident or injury. Mr. Fisher further testified that he would have ensured the necessary measures were taken if Mr. Dobbs failed to complete an accident report. Mr. Fisher testified that he was also Claimant's supervisor and saw Claimant on a daily basis; yet, Claimant neither reported an accident/injury to him nor asked for his assistance in completing an accident report or obtaining medical care. Mr. Fisher also testified that he was not aware of Claimant's alleged continued requests for medical assistance or a formal accident report. According to Mr. Fisher, Employer's safety procedures were strictly enforced and well known throughout Employer's Lake Charles office. Mr. Johnson and Mr. McCoy reiterated Mr. Fisher's testimony as to the strict enforcement of safety protocol.

Several additional inconsistencies in Claimant's testimony are noted which weigh heavily on Claimant's credibility. Claimant testified that Mr. Dobbs's failed to complete an accident report because he was on probation. However, Mr. Johnson, Employer's regional vice president and Mr. Dobbs's immediate supervisor, testified that Mr. Dobbs was not in fact on probation. Claimant also gave conflicting testimony as to his job requirements. He testified at his deposition that he carried equipment weighing approximately 20 pounds, an assertion supported by the testimony of Mr. Gentry and Mr. Fisher. However, at formal hearing, Claimant testified that the work equipment weighed 35 to 40 pounds after samples were taken. Claimant's deposition testimony also indicated that he performed tasks ranging from ankle to waist height. However, at formal

hearing, he testified that his job also required overhead reaching and climbing. Lastly, Claimant testified that he was unfamiliar with an anonymous employee hotline and that he did not have ready access to the offsite human resources and safety department or to Mr. Dobbs's supervisor. Other witnesses called at formal hearing, including Mr. Johnson, Mr. Fisher, and Mr. McCoy, testified that all employees received notice of the employee hotline during safety training and that the telephone numbers for the human resources and safety departments were conspicuously posted on the bulletin board in the inspector's room. Additionally, Mr. Johnson testified to being readily available to all employees.

It is also noteworthy that Claimant contends he did not utilize alternative accident reporting procedures because Mr. Dobbs was assisting with the reinstatement of his health insurance. Claimant's health insurance was in fact reinstated on September 1, 2003, according to the testimony of Claimant and Mr. Johnson. Nevertheless, an accident report was never completed. Had Claimant reported an accident/injury, his medical treatment and care would have been the responsibility of the insurance carrier on the risk not his group health insurer. I find Claimant's explanation for not pursuing other avenues for accident reporting to be unpersuasive.

Based on the foregoing, I find Claimant's testimony not entirely credible. In light of Mr. Fisher's testimony and the testimony of other witnesses regarding Employer's safety procedures, I find it difficult to believe Claimant was unfamiliar with Employer's accident reporting protocol and available means of assistance. While Mr. Fisher admittedly was not present for every conversation between Claimant and Mr. Dobbs, I further find that his absence has no bearing on the incredulity of Claimant's testimony, as Claimant placed Mr. Fisher at the meeting between himself and Mr. Dobbs when he allegedly reported the accident and sought medical care. Further, Claimant's testimony contained numerous inconsistencies. While each inconsistency alone may not be sufficient to discredit Claimant, the effect of the contradictions when considered as a whole significantly bears upon the weight to be afforded to his testimony.

The medical histories provided by Claimant to the physicians at LSU medical center identify different dates for the onset of shoulder pain. Additionally, Claimant failed to initially notify the physicians of the alleged August 2003 accident and it is first referenced in medical records dated May

2004 – approximately seven months after Claimant first sought treatment and presented complaints of shoulder pain at LSU Medical Center. Despite these inconsistencies, I decline to lessen Claimant's credibility on the basis of the information contained within the medical reports because he informed Dr. Foret of the August 2003 onset of pain during his November 2003 treatment.

I find that the inconsistencies in Claimant's testimony raise significant questions about Claimant's credibility and the weight to be accorded his testimony. Notwithstanding these inconsistencies and contradictory statements, I will analyze whether Claimant provided sufficient notice pursuant to Section 12(a) and whether Claimant established a **prima facie** claim for compensation.

B. Timely Notice Under Section 12(a)

Section 12(a) of the Act provides that notice of an injury or death for which compensation is payable must be given within 30 days after injury or death, or within 30 days after the employee or beneficiary is aware of, or in the exercise of reasonable diligence or by reason of medical advice should have been aware of, a relationship between the injury or death and the employment. It is the claimant's burden to establish timely notice. See 33 U.S.C. §912(a).

Failure to provide timely notice of an injury, as required by Section 12(a), bars a claim unless it is excused under Section 12(d) of the Act. Pursuant to Section 12(d), the failure to provide such notice of an injury to an employer will not act as a bar to the claim if the employer either (1) had knowledge of the injury or (2) was not prejudiced by the lack of notice. See 33 U.S.C. §912(d)(1),(2); See Sheek v. General Dynamics Corp., 18 BRBS 151 (1986), decision on recon., modifying 18 BRBS 1 (1985).

In the absence of evidence to the contrary, Section 20(b) of the Act presumes that the notice of injury and the filing of the claim were timely. See Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140 (1989). Accordingly, to establish prejudice, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to claimant's failure to provide timely notice pursuant to Section 12. See Cox v. Brady-Hamilton Stevedore Company, 25 BRBS 203 (1991); Bivens v. Newport News Shipbuilding & Dry Dock Co., 23 BRBS 233 (1990).

Prejudice is established where the employer demonstrates that due to the claimant's failure to provide timely written notice, it was unable to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services. Strachan Shipping Co. v. Davis, 571 F.2d 968, 972, 8 BRBS 161 (CRT) (5th Cir. 1978); Addison v. Ryan Walsh Stevedoring Company, 22 BRBS 32 (1989).

In the present claim, Claimant alleges that an accident and injury occurred on August 18, 2003. Claimant further alleges that he reported the accident to Mr. Dobbs on the same date. However, an accident report was not filed immediately and Employer did not receive notice of the incident until December 20, 2003.[23] (EX-1, p. 2). Consequently, I find and conclude the record does not support the Section 20(b) presumption of timely notice of injury because the record contains evidence to the contrary.

I find and conclude Employer did not have knowledge of Claimant's alleged accident and injury, despite Claimant's testimony that he reported the incident to Mr. Dobbs. I have already discounted Claimant's testimony as incredible due to many inconsistencies and contradictions. Although Mr. Dobbs is not available either to support or to deny Claimant's alleged report of the accident, the record establishes that Employer strictly enforced a safety policy that required supervisors to promptly report any alleged accidents or injuries. Additionally, the record establishes that employees were familiar with the safety policy and were familiar with the alternate reporting mechanisms available to them. Consequently, Claimant's incredible testimony is the only record evidence to support his allegation that he provided notice to his supervisor. I will not impute knowledge of the alleged incident to Employer based solely on Claimant's testimony.

Nonetheless, I find and conclude Employer was not prejudiced by Claimant's failure to provide notice within 30 days of the alleged accident and injury. Because Mr. Dobbs was deceased at the time Claimant provided notice of the accident,

[23] It is unclear when Employer first received notice of the accident. According to Claimant's post-trial brief, Employer received written notice of the accident in November 2003. However, in its post-trial brief, Employer contends it did not receive notice until January 2004. "Employer's Report of Industrial Injury" is the only document of record to set forth a notification date, which it identifies as December 2, 2003. (EX-1, p. 2). Consequently, I find December 2, 2003 to be the date of notification.

Employer contends it was prejudiced by having "no one to interview, because the ***only*** witness besides [Claimant] was deceased." (Emphasis in original). However, I find that Mr. Dobbs's testimony would be relevant only in establishing the timeliness of Claimant's notice. The record and testimony does not suggest that Mr. Dobbs was a witness to the alleged accident and injury. Consequently, the fact that this "witness" is no longer available bears little weight on the issue of prejudice, except to establish that Employer may have been able to more expediently and easily investigate the incident if a report had indeed been made by Claimant. While the delayed notice arguably made it more difficult for employer to investigate the claim, the allegation of difficulty in investigating is not sufficient to establish prejudice. See Williams v. Nicole Enterprises, 21 BRBS 164 (1988).

Although Employer received notice approximately four months after the alleged accident, the notice was provided almost one year before formal hearing was held in this matter. Additionally, Employer was placed on notice nearly nine months prior to Claimant's shoulder surgery. Consequently, I find and conclude Employer was not prejudiced in its ability to effectively investigate to determine the nature and extent of the alleged illness or to provide medical services.

Based on the foregoing, I find and conclude the present claim is not barred under Section 12(a) for failure to timely provide notice of the claim because Employer was not prejudiced by the untimely notice.

C. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary-that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which **could have caused** the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a **prima facie** case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant contends he suffered a compensable work-related injury to his left shoulder on August 18, 2003. According to Claimant, he sustained a rotator cuff tear when he slipped and used his arm/shoulder to "brace his body weight" while performing an inspection at Devall Fleet. Employer contends Claimant has not presented "substantial evidence" to support his claim and argues the record does not support a finding of a **prima facie** case.

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

In the present matter, Claimant had sought treatment from Dr. Foret in November 2002 for an earlier injury to his left shoulder. During the course of treatment, Claimant underwent an MRI in November 2002 which did not reveal a rotator cuff tear. Following the alleged August 2003 accident, a second MRI was performed in January 2004 which revealed a rotator cuff tear in Claimant's left shoulder. Additionally, Claimant presented with symptoms during his second course of treatment that were not present earlier. Accordingly, Dr. Foret opined that "something" happened to Claimant's shoulder during the interval between treatments.

Mr. Lognion and Ms. Byrd both testified that Claimant complained of left shoulder pain and began holding his shoulder close to his body in August 2003. Claimant also testified that

he experienced "intensified pain" when attempting "outward movement" of his arm above his head. The medical records from LSU Medical Center also note that Claimant presented with complaints of left shoulder pain and limited arm movement.

While I afford little weight to the testimony of Claimant alone, I find his complaints of pain and limited motion are corroborated by the testimony of Dr. Foret, Mr. Lognion, and Ms. Byrd, along with the medical reports from LSU Medical Center. Based on the foregoing, I find and conclude Claimant has satisfied the first element of his **prima facie** case by establishing an injury to his left shoulder.

Claimant alleges that he injured his left shoulder while performing an inspection at Devall Fleet on August 18, 2003. Despite the inconsistent accident dates provided by Claimant, Employer's work records indicate that Claimant was assigned to Devall Fleet on August 18, 2003. According to Claimant, he slipped on the deck of a tugboat and grabbed onto a ladder with his left arm to prevent himself from falling. Claimant reported hearing a pop in his shoulder. Although I do not fully credit Claimant's testimony, I find that it is feasible that an accident occurred as reported by Claimant and that conditions existed at work which could have caused the injury.

I find Claimant's contentions further supported by the testimony of Dr. Foret. Dr. Foret reviewed Claimant's second MRI of January 2004, which revealed a rotator cuff tear that was not present in Claimant's November 2002 MRI. According to Dr. Foret's testimony, a rotator cuff tear is likely to occur in a slip and fall incident as described by Claimant. Consequently, as to the second element of Claimant's **prima facie** case, I find and conclude Claimant has established that an accident occurred in the course of employment, or conditions existed at work, which **could have caused** his injury.

Based on the foregoing, I find and conclude Claimant has established a **prima facie** case that he suffered a shoulder injury under the Act, having established that he suffered a harm or pain on or about August 18, 2003, sufficient to invoke the Section 20(a) presumption.

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working

conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994);. "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982). It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a)

presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

Employer contends it has presented substantial evidence to rebut the Section 20(a) presumption. Specifically, Employer references Claimant's failure to report the accident in either a formal accident report or during his initial medical treatment after August 2003.

I disagree with Employer's assertion that Claimant's failure to report an August 2003 accident is substantial evidence to rebut the Section 20(a) presumption. The contentions made by Employer merely establish a failure to report an accident and have no bearing whatsoever on the causal connection between Claimant's accident/injury and his working conditions. Consequently, I find and conclude these assertions are insufficient to rebut the Section 20(a) presumption.

Although not argued in Employer's post-hearing brief, the record offers limited information on two additional non-work-related accidents which could arguably rebut the Section 20(a) presumption. Claimant testified that he sustained an injury to his ribs in a boating accident in July 2002. According to Dr. Foret, the action of grabbing the side of a boat to prevent one's self from falling is the kind of action that could cause a rotator cuff tear. However, the boating accident occurred in July 2002, prior to Claimant's initial MRI of November 2002. Consequently, I find and conclude the rotator cuff tear did not occur during the boating accident because the rotator cuff tear was not present at the time of the 2002 MRI. Accordingly, I find and conclude the occurrence of the boating accident in July 2002 does not sever the causal connection and does not rebut the Section 20(a) presumption.

In February 2003, Dr. Foret's report indicated Claimant experienced a burning and tingling sensation in his left shoulder after his arm was "pulled" by a dog on a leash. Dr. Foret opined that the "pulling" could have caused a rotator cuff tear, but suggested that such a tear was unlikely to occur during the described incident. Without more, I find that Employer has not presented substantial evidence to connect Claimant's left shoulder injury to the February 2003 incident rather than the August 18, 2003 work-related accident. Accordingly, I find and conclude the Section 20(a) presumption

has not been rebutted.

Based on the foregoing, I find and conclude Employer has failed to rebut the Section 20(a) presumption established by Claimant. Employer has not presented sufficient evidence to support the contention that Claimant's injury was not caused by his working conditions. Employer offered no additional medical opinions into the record. Employer offered no medical evidence to sever the causation presumption. At most, Employer has presented speculative scenarios which could have resulted in Claimant's rotator cuff tear. However, without more substantial support, I find and conclude that the Section 20(a) presumption is not rebutted.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after

reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for

purposes of explication.

The record is devoid of any medical opinion placing Claimant at MMI on or before the date of formal hearing. The medical records from LSU Medical Center anticipated that Claimant would be released to "all activities" on December 13, 2004. However, Claimant's post-hearing brief indicates that Dr. Day did not release Claimant to work as anticipated, due to continued shoulder problems.[24] Consequently, I find and conclude Claimant is temporarily disabled based on the lack of any medical opinion placing Claimant at maximum medical improvement.

August 18, 2003 through September 23, 2003

When a claimant has a physical impairment from an injury but is doing his usual work adequately, regularly, full-time, and without due help, the ALJ may find that the employee's actual wages fairly represent his wage earning capacity, and he has suffered no loss and therefore is not disabled. See 33 U.S.C. §908(h); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 194 (1984). See also Darcell v. FMC Corp., Marine & Rail Equip. Div., 14 BRBS 294 (1981)(where an employee is working at a useful job which pre-dates his employment and pays wages commensurate with the work, and he is earning higher wages on the same union scale as he was prior to his injury, he has not suffered a loss in wage-earning capacity); Kendall v. Bethlehem Steel Corp., 3 BRBS 255 (1976), aff'd mem., 551 F.2d 307 (4th Cir.), cert. denied, 434 U.S. 829 (1977).

However, even if able to work, a claimant may be found to be totally disabled if he is working with **extraordinary effort** and in excruciating pain. Louisiana Insurance Guaranty Association v. Bunol, 211 F.3d 294 (5th Cir. 2000), citing Argonaut Ins. Co v. Patterson, 846 F.2d 715 (11th Cir. 1988); see also Newport News Shipbuilding & Dry Dock Co. v. Vinson, 2002 WL 1343440 (4th Cir. 2002)(unpublished).

Between August 18, 2003 and September 23, 2003, Claimant did not seek medical attention for his left shoulder injury. Consequently, there are no medical opinions of record restricting Claimant's activities during that time frame. Although the record indicates that Claimant continued to complain of pain and that Claimant received assistance on two inspections from Mr. Lognion, I find that these two factors do not support a conclusion that Claimant was unable to return to

[24] Employer did not address a date of MMI in its post-hearing brief.

his regular employment. Claimant testified that he performed his "regular duties" after the August 18, 2003 accident. Mr. Johnson and Mr. Fisher testified that Claimant continued to receive "normal" job assignments between August 18, 2003 and September 23, 2003.

Additionally, the record contains no evidence that Claimant experienced excruciating pain and there are no medical reports to support such a suggestion. Additionally, the record does not support a conclusion that Claimant experienced difficulty in performing his job or extended "extraordinary effort" to complete his tasks. The record indicates Claimant was able to perform his regular duties. Further, there are no medical restrictions assigned to Claimant between August 18, 2003 and September 23, 2003. Thus, there is no evidence that Claimant worked outside of any restrictions.

Accordingly, I find and conclude Claimant has not established a **prima facie** case of total disability because he was able to return to his pre-injury work and earn pre-injury wages during this time period. Thus, I find and conclude Claimant suffered no loss in wage earning capacity and is not entitled to disability compensation from August 18, 2003 through September 23, 2003.

September 24, 2003 through November 18, 2003

The Board has held that when a claimant voluntarily leaves the workforce after sustaining a traumatic injury, the administrative law judge may deny total disability benefits on the basis that the claimant failed to establish a loss in wage-earning capacity. Hoffman v. Newport News Shipbuilding & Dry Dock Co., 35 BRBS 148 (2001); Burson v. T. Smith & Son, Inc., 22 BRBS 124 (1989).

Based on the record, I find Claimant voluntarily resigned from his employment for reasons unrelated to his left shoulder injury on September 23, 2003. The record indicates that Claimant had worked several shifts and received two additional assignments on September 23, 2003. Claimant testified that he was instructed to "turn in" his equipment. However, Mr. Fisher testified that Claimant stated he would turn in his equipment if he was assigned the additional work and that Claimant "offered" to quit by refusing to perform the additional assignments. Mr. Fisher further testified that Claimant did not report shoulder pain or request medical treatment on September 23, 2003. Most notably, Mr. Fisher testified that Claimant would have remained

employed if he had not "offered" to quit on September 23, 2003. I find Mr. Fisher's testimony to be more credible than Claimant's contentions that he did not "quit" and that he reported shoulder pain.

The record contains no restrictions on Claimant's work activities prior to November 19, 2003. Accordingly, I find and conclude Claimant would have continued earning pre-injury wages while performing his pre-injury job duties if he had not tendered his resignation on September 23, 2003. Thus, I find and conclude Claimant has failed to demonstrate a loss in wage earning capacity due to his injury and is not entitled to disability benefits from September 23, 2003 through November 18, 2003.

November 19, 2003 through September 19, 2004

On November 19, 2003, Claimant was taken off work "until further notice" by Dr. Foret. Dr. Foret's work removal slip is the earliest evidence of record indicating that Claimant was unable to return to his former employment. Accordingly, I find and conclude Claimant established a **prima facie** case of total disability beginning on November 19, 2003.

Employer argues that Claimant is not entitled to total disability benefits. According to Employer, Claimant is precluded from disability benefits because he could physically perform his job duties and because he resigned from employment for reasons unrelated to his injury. Employer cites no authority for its contentions.

I am not persuaded by Employer's arguments and find Employer liable for Claimant's temporary total disability as of November 19, 2003. Through the medical records of Dr. Foret, Claimant established that he could not return to "work" pending the performance of an MRI. Although Claimant voluntarily withdrew from his employment with Employer, the record contains no evidence to indicate Claimant intended to withdraw from the labor market as a whole. As such, when he was prevented from returning to "work" by Dr. Foret because of his work-related shoulder injury, Claimant experienced a loss in wage earning capacity because he was precluded from obtaining any earnings whatsoever. Claimant was removed from work due to his work-related left shoulder injury; thus, I find and conclude that the cause of Claimant's loss in wage earning capacity is directly related to his work injury. Consequently, I decline to excuse Employer's liability for a work-related injury based solely on

the fact that Claimant resigned from employment prior to the time the extent of his disability became manifest. See generally Harmon v. Sea-Land Service, Inc., 31 BRBS 45 (1997) (When Claimant voluntarily retired after sustaining a traumatic work injury, the Board held Claimant met his burden that the work injury precluded his return to usual work and noted his "entitlement to disability benefits vested when he was injured and established a work related disability which impaired his earning abilities.").

After August 18, 2003, the record contains only the November 19, 2003 work slip in which Dr. Foret places Claimant off work pending an MRI. However, the record does not contain any work release forms or work restriction forms from Dr. Foret following his review of Claimant's MRI in January 2004. Additionally, the medical records from LSU Medical Center neither specify that Claimant was not to work nor do they release Claimant to any work activities prior to his September 20, 2004 shoulder surgery. Without a documented release to work after November 19, 2003, I find and conclude Claimant remained temporarily totally disabled from November 19, 2003 through September 19, 2004.

September 20, 2004 through October 31, 2004

The record establishes that Claimant received treatment at LSU Medical Center-Shreveport, from October 14, 2003 to November 1, 2004, including shoulder impingement series, diagnostic testing, physical therapy, and ultimately surgery.

On September 20, 2004, Claimant underwent shoulder surgery at LSU Medical Center for his work-related left shoulder injury. Although the record does not contain a work slip removing Claimant from work, there is no indication that Claimant was released back to work after Dr. Foret's work removal in November 2003. I find that fact lends additional support to a finding of total disability during Claimant's period of convalescence following his shoulder surgery. Accordingly, I find and conclude that Claimant was totally disabled during the convalescence period of September 20, 2004 through October 31, 2004.

November 1, 2004 through present and continuing

On November 1, 2004, a work-release form was signed by a physician at LSU Medical Center. The form restricted Claimant's activities to no lifting of greater than 25 pounds and no

"strenuous overhead activity." Additionally, the form restricted Claimant's climbing activities that required use of his left arm to "less than 25 pounds." The release form anticipated a release to full activities on December 13, 2004.

After reviewing the record, I find and conclude Claimant's work restrictions as of November 1, 2004 would not preclude Claimant from performing his "usual" pre-injury job duties. According to Claimant's deposition testimony and the testimony of Mr. Fisher and Mr. Gentry, inspectors are required to carry equipment weighing an average of 20 pounds. Additionally, while the record suggests that Claimant's position required some overhead activity when climbing in and out of tanks, the record also suggests that Claimant primarily engaged in activities at waist level or below. Consequently, I find and conclude the overhead work as presented in the record is arguably not "strenuous" in nature. Finally, Claimant received a restriction on climbing that required use of his left arm, the restriction specifies a weight limit of no more than 25 pounds. Given the testimony regarding the weight of the equipment and the testimony that inspectors could distribute the weight among several trips, I find that this restriction comports with Claimant's normal job duties as well.

Accordingly, I find and conclude Claimant was not totally disabled from November 19, 2004 through present and continuing. Although Claimant was not released to MMI or "full duty," I find and conclude that the work restrictions assigned as of November 1, 2004 do not preclude him from performing his "usual" job duties. See Bryant v. Carolina Shipping Company, Inc., 25 BRBS 294 (1992)(Claimant physically and medically able to seek work even though he had not reached MMI). Even though Employer did not establish suitable alternative employment, I find it is not required to do so because Claimant voluntarily resigned from employment for reasons unrelated to his injury. Consequently, I find that Claimant's resignation severed Employer's responsibility to establish suitable alternative employment. Thus, I find and conclude Claimant is not entitled to any disability compensation from November 19, 2004 through present and continuing.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital

> service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal. Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977). Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on his own initiative was necessary for treatment of the injury. Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking his employer's authorization of medical treatment. See generally 33

U.S.C. § 907 (d)(1)(A). Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care. Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982). Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care. Id.

Having found and concluded that Claimant suffered a compensable injury, Employer/Carrier are responsible to Claimant for all reasonable, necessary and appropriate medical expenses casually related to his August 18, 2003 work injury. The fact that Claimant voluntarily quit his employment with Employer does not absolve Employer from responsibility for medical treatment for his work-related injury.

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, I find Employer was notified of Claimant's injury on December 2, 2003. Employer filed its first notice of controversion on January 20, 2004. Employer filed a second notice of controversion on February 7, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due.[25] Thus, Employer was liable for Claimant's total disability compensation payment on December 16, 2003. Because Employer controverted Claimant's right to compensation, Employer had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). A notice of controversion should have been filed by December 30, 2003, to be timely and prevent the application of penalties. Consequently, I find and conclude that Employer did not file a notice of controversion until January 20, 2004, and is liable for Section 14(e) penalties from

[25] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

December 31, 2003 until January 19, 2004.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[26] A

[26] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 7,**

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from November 19, 2003 to October 31, 2004, based on Claimant's average weekly wage of $662.91, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's August 18, 2003, work injury, pursuant to the provisions of Section 7 of the Act.

3. Employer shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing from December 31, 2003 to January 19, 2004.

4. Employer shall receive credit for all compensation heretofore paid, as and when paid.

5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

2004, the date this matter was referred from the District Director.

ORDERED this 31st day of March, 2005, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge